A SLAPP in the Face: Why Principles of Federalism Suggest that Federal District Courts Should Stop Turning the Other Cheek

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I. Introduction

This article examines the nexus between state and federal law where Strategic Litigation Against Public Participation ("SLAPP")[2] and anti-SLAPP statutory schemes are litigated by a federal district court sitting in diversity. In particular, this article explores the standard the federal court should apply when an anti-SLAPP early motion to dismiss is brought by a SLAPP defendant and the plaintiff challenges dismissal on the basis of the Federal Rules of Civil Procedure pursuant to the regime established by the Supreme Court in *Hanna v. Plumer*.[3]

This article argues that a number of district courts are turning federalism principles on their collective heads, not to mention directly perverting the "twin aims" set forth in *Erie Railroad*

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2. SLAPP was originally coined by Penelope Canan and George W. Pring in their pathbreaking article, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988).

3. Hanna v. Plumer, 380 U.S. 460 (1965).

Co. v. Tompkins[4] and its progeny, when those courts insist upon ignoring a state's statutory scheme for stemming what is plainly improper litigation.[5] The entire idea behind anti-SLAPP legislation is to put the brakes on lawsuits that are filed for the sole purpose of bullying the "defendant" out of exercising fundamental rights. The SLAPP plaintiff having no intention of winning the lawsuit, simply wants to silence the SLAPP defendant.

Moreover, no one seems to know what to do about this trend. There is a distinct split in the law coming out of the federal circuits, sometimes even within the same circuit. For example, in 1999, the Ninth Circuit held that there was no "direct collision" between the federal rules and the California rules, and therefore an "unguided" *Erie* analysis demands that the state law should be applied.[6] Two years later, the same court held that Rule 56[7] is in direct conflict with the early motion to dismiss in the anti-SLAPP statutory scheme.[8] There, the court quoted *Rogers v. Home Shopping Network, Inc.*: "Because the discovery limiting aspects of 425.16(f) and (g) collide with the discovery allowing aspects of Rule 56, these aspects of subsections (f) and (g) cannot apply in federal court."[9] The Ninth Circuit concludes: "We agree."[10] Applying *Hanna v. Plumer*,[11] the court determined that Rule 56 occupies the field, thereby nullifying an important weapon provided by the anti-SLAPP statutory scheme. Moreover, because Rule 56 is not unconstitutional nor does it violate the Rules Enabling Act, it trumps state legislation.[12] While the latter interpretation might warm the cockles of

4. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

5. Some may argue that if the SLAPP suit really is "improper litigation," then Rule 11 is more than equal to the task of curtailing such litigation. For reasons that may or may not become clear by the end of this article, this author believes that Rule 11 does not adequately address the issues at hand.

6. U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999).

7. FED.R.CIV.P. 56.

8. Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832 (9th Cir. 2001).

9. Rogers v. Home Shopping Network, Inc., 57 F. Supp.2d 973, 980 (C.D. Cal. 1999).

10. *Id.*

11. Hanna, 380 U.S. 460 (1965).

12. Metabolife, 264 F.3d at 832.

Justice Story's heart,[13] it would almost surely horrify the Justices who went on to shape the modern *Erie* Doctrine.

Accordingly, part II of this article will sketch the typical anti-SLAPP regime and part III will briefly review the state of the *Erie* Doctrine as it exists as of the writing of this article. Part IV will argue that federal district courts sitting in diversity are remiss in ignoring anti-SLAPP early motions to dismiss under the *Erie* doctrine and the basic notions of federalism that underlie *Erie* itself.

II. Anti-SLAPP Regimes

Anti-SLAPP statutory schemes[14] have been enacted in

13. Justice Story penned the now infamous *Swift v. Tyson*, 41 U.S. 1 (1841).

14. California's statute is illustrative. CAL. CIV. PROC. CODE § 425.16 (2007) provides:

> (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.
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> (b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
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> (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
>
> (3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.
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> (c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.
>
> (d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

twenty-three jurisdictions,[15] and considered in thirteen others.[16] These statutes are designed to give courts a mechanism for

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.
(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.
(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.
(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."
(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.
(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.
(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

15. These states are: Arkansas (ARK. CODE ANN. §§ 16-63-501-508 (2007)); Delaware (DEL. CODE ANN. tit. 10 §§ 8136-8138(2007)); Florida (FLA STAT. ANN. § 768.295(2007)); Georgia (GA. CODE ANN. § 9-11-11.1(2007)); Hawaii (HAW. REV. STAT. § 634F (2007)); Indiana (IND. CODE ANN. § 34-7-7 (2007)); Louisiana (LA. CODE CIV. PROC. ANN. art. 971 (2007)); Maine (ME. REV. STAT. ANN. tit. 14 § 556 (2007)); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (2007)); Massachusetts (MASS. GEN. LAWS ch. 231, § 59H (2007)); Minnesota (MINN. STAT. §§ 554.01-554.05 (2007)); Missouri (MO. REV. STAT. § 537.528 (2007)); Nebraska (NEB. REV. STAT. §§ 25-21,241-25-21,246 (2007)); Nevada (NEV. REV. STAT. §§ 41.635-41.670 (2007)); New Mexico (N.M. REV. STAT. § 38-2-9.1-38-2-9.2 (2007)); New York (N.Y. CIV. RIGHTS LAW §§ 70-a and 76-a (2007)); Oklahoma (OKLA. STAT. tit. 12 § 1443.1

dealing with non-meritorious lawsuits. Broadly speaking, SLAPP suits are not brought to vindicate a legally cognizable right, but rather to annoy and harass the defendant/target of the suit.[17] The SLAPP plaintiff's objective is not to win, but rather to chill the target's constitutionally protected rights to free speech or to petition for redress of grievances.[18] As one court put it,

> while SLAPP suits masquerade as ordinary lawsuits, the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their legal rights or to punish them for doing so. Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions . . . are inadequate to counter SLAPPs. Instead, the SLAPPer considers any damage or sanction award which the SLAPPee might eventually recover as a cost of doing business.[19]

The paradigm SLAPP suit, and the example most frequently given, is that of a real estate developer suing citizens who are protesting a locally unpopular land use for defamation or intentional interference with prospective economic advantage.[20] The developer does not intend to win, but rather hopes that the citizens will cease their obstructive behavior. In essence, the SLAPP plaintiff seeks to alter the playing field by morphing what is essentially a political dispute into one that purports to constitute a legally cognizable claim.[21] It is not, of course, but that does not prevent the SLAPP plaintiff from forc-

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(2007)); Oregon (OR. REV. STAT. §§ 31.150-31.155); Pennsylvania (27 PA. CONS. STAT. ANN. §§ 8301-8305 (2007)); Rhode Island (R.I. GEN. LAWS §§ 9-33-1-9-33-4 (2007)); Tennessee (TENN. CODE ANN. §§ 4-21-1001-4-21-1004 (2007)); Utah (UTAH CODE ANN. §§ 78-58-101-78-58-105); and Washington (WASH. REV. CODE §§ 4.24.500-4.24.520 (2007)).

16. The states with current or previous legislation pending include Arizona, Colorado, Connecticut, Illinois, Kansas, Michigan, New Hampshire, New Jersey, Texas and Virginia. *See* http://www.casp.net/menstate.html. The states that have judicial common law doctrine include Colorado and West Virginia. *Id.* Legislation is being advocated in North Carolina. *Id.*

17. Wilcox v. Superior Court, 27 Cal. App. 4th 809, 816-17 (1994).

18. Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988). Professors Canan and Pring quote an ACLU attorney representing a SLAPP defendant/target: "[t]he plaintiffs were hoping that the defendants would drop their petitioning activity because of the attorneys' fees involved in defending the suit." *Id.* at 514.

19. *Wilcox*, *supra* note 17 at 817. Internal quotations and citations omitted.

20. *See, e.g.*, Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L. J. 665 (2000).

21. Canan and Pring, *supra* note 18.

ing the defendant/target into expending resources to defend the SLAPP suit.

The primary purpose of anti-SLAPP legislation is to protect SLAPP defendant/targets from the expense and anxiety associated with litigating these lawsuits. For that reason, most of these statutes have provisions for staying discovery pending an early motion to dismiss or strike.[22]

In order to be considered a SLAPP suit, there must be a civil complaint, or counterclaim, filed against a group or an individual for monetary damages or injunction, which suit arises out of the defendant/target's communication to a governmental body or the electorate on an issue of public concern.[23] Thus, the SLAPP defendant/target bears the initial burden of making a prima facie showing that the SLAPP suit arises from the defendant/target's act in furtherance of rights to petition or to free speech under the Constitution.[24] Once the court determines that an act in furtherance of a protected right is being challenged by a civil suit, the burden shifts to the SLAPP plaintiff to demonstrate a "reasonable probability" of prevailing on its claims[25] The standard is similar to that when a court is weighing a motion for directed verdict. The court should grant the early motion to dismiss only if no reasonable jury could find for the SLAPP plaintiff.[26]

Anti-SLAPP regimes offer the SLAPP defendant/target an expedited form of adjudication, thereby freeing the defendant from defending against a meritless suit. Even more important to the defendant/target, however, is the fact that filing an early motion to strike under an anti-SLAPP regime typically stays discovery.[27] A stay in discovery while the anti-SLAPP motion to strike is pending makes the suit much less disruptive and harassing to the defendant/target, thereby thwarting the SLAPPer's primary motivation to maintain the suit, or even file it in the first place. The expedited review, in conjunction with a stay

22. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (2007), *supra* note 14.

23. *See, e.g.*, Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965 (1999).

24. United States *ex rel.* v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir.1999).

25. Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832 (9th Cir. 2001).

26. *Id.*

27. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (2007).

in discovery, takes the "teeth" out of the SLAPP suit in that it is no longer a lengthy and expensive proposition for the defendant/target.

State legislatures that have adopted anti-SLAPP statutes want to curtail SLAPP suits by making them a less attractive means of challenging protected citizen behavior. These statutes are only as effective as the courts enforcing them. For the most part, state courts have been fairly consistent in applying anti-SLAPP statutes. The federal judiciary, on the other hand, appears to be reluctant to apply the expedited review and discovery-staying provisions of anti-SLAPP statutes.[28] Most federal courts that decline to enforce anti-SLAPP statutes do so, ironically, by relying on the *Erie* doctrine despite the fact that the states have a strong substantive interest in enforcement of this legislation for a variety of important policy reasons. Indeed, if the trend continues, SLAPPers will be encouraged to forum shop and file in federal court whenever possible in direct violation of one of the "twin aims" of *Erie* itself. Accordingly, the following part sketches the *Erie* doctrine before turning to the federal opinions interpreting the anti-SLAPP statutes.

III. A Brief Review of *Erie*[29]

Any discussion of the *Erie* doctrine must begin with the first judiciary act, which contained the Rules of Decision Act ("the Act" or "RDA").[30] The Act states, in its entirety, "[t]he laws of the several states, except where the Constitution or Acts of Congress otherwise or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." This was obviously a part of the Founders' desire to ensure the autonomy of the several states, a core principle of Federalism. Basically, the Act requires federal

28. *See, e.g.*, Milford Power Ltd. P'ship v. New England Power Co., 918 F. Supp. 471, 489 (D. Mass. 1996), stating "[g]iven the unsettled status of the scope and application of the Massachusetts anti-SLAPP statute, the special motion to dismiss by Milford and its affiliates will be DENIED without prejudice."

29. Portions of the following part have appeared in another of the author's publications: Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages: A Critical Re-Examination of the American Jury*, 36 U.S.F.L. REV. 411 (2002).

30. The Act is now codified at 28 U.S.C. § 1652 (2006).

district courts to apply the law of the state in which it sits; this is the core of *Erie*.

Long before *Erie*, however, the mischief began in 1841 in *Swift v. Tyson*.[31] There, Justice Story held the common law decisions of New York courts were not "law" in the sense used in the Act, and, therefore, the rulings of the New York courts were not binding upon federal courts. Rather, only the codified statutory schemes were to be considered "law" for purposes of interpreting the Act. The logical conclusion of *Swift* is that New York common law could be entirely ignored. On this point, Justice Story, writing for a nearly unanimous Court, stated that the Act applied only "to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the right and titles to real estate, and other matters immovable and intra-territorial in their nature and character."[32] Thus, the Court in *Swift* held that the Act required federal courts to apply state law only where there was an applicable state constitutional provision or state statute, or where the dispute concerned something uniquely tied to the state forum, such as real property.[33] The Court went on to state that the Act "does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."[34]

Swift was taken to the absurd in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co*.[35] The Brown & Yellow Taxicab Company, a Kentucky corporation, entered into an exclusive dealing contract with a railroad, pursuant to which it undertook to transport passengers to and from the railroad station.[36] Despite the agreement, the railroad permitted a competing taxicab company, the Black & White Taxi-

31. Swift v. Tyson, 41 U.S. 1 (1841).
32. *Id.* at 18.
33. *Id.* at 18-19.
34. *Id.* at 19.
35. Black & White Taxicab & Transf. Co. v. Brown & Yellow Taxicab & Transf. Co., 276 U.S. 518 (1928).
36. *Id.* at 523.

cab Company, also a Kentucky corporation, to operate on the railroad's premises.[37]

Brown & Yellow wanted to enforce the exclusive dealing contract with the railroad, but it had a problem—Kentucky state courts had long since determined that such contracts were contrary to public policy, and, as a result, had refused to enforce them.[38] The federal judiciary, however, had no such "general jurisprudence," and was inclined to enforce such transactions.[39] Thus, if Brown & Yellow wanted to have its contract enforced, and successfully enjoin Black & White from soliciting passengers at the railroad station, it must somehow venue the action in federal district court, and must, therefore, find a valid basis of subject matter jurisdiction.

In order to create diversity jurisdiction, Brown & Yellow reincorporated in Tennessee and then brought suit against Black & White and the railroad company in a federal district court in Kentucky.[40] Black & White argued that the reincorporation was fraudulent, and done only to create diversity, and should therefore be insufficient to confer subject matter jurisdiction within the federal judiciary. The Court disagreed, noting that "[t]he succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into the motives when deciding concerning their jurisdiction."[41]

Having found subject matter jurisdiction, the Court easily disposed of the case. First, the Court noted that Justice Story had "fully expounded" on the RDA,[42] in *Swift* and correctly held that "in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the state in which the controversy arises, are free to exercise their own independent judgment."[43] Thus, the Court held that subject matter jurisdiction was established, notwithstanding the

37. *Id.*
38. *Id.* at 525 (citing McConnel v. Pedigo, 92 Ky. 465 (1892)).
39. *Id.* at 528. The Court stated that "[t]he cases cited show that the decisions of the Kentucky Court of Appeals holding such arrangements invalid are contrary to the common law as generally understood and applied."
40. *Id.* at 523-24.
41. *Id.* at 524.
42. *Id.* at 530.
43. *Id.*

artificial nature of it, and that federal "general common law" applied. Since the federal law permitted such exclusive contracts, the Court issued the injunction, a result that would never have occurred in a Kentucky court.

This holding prompted an eloquent dissent by Justice Holmes, which was joined by Justices Brandeis and Stone. In Justice Holmes' view, the rules arising out of *Swift* and its progeny amounted to "an unconstitutional assumption of powers by the Courts of the United States. . . ." He argued that "no lapse of time or respectable array of opinions should make us hesitate to correct it."[44] Justice Holmes was concerned with state sovereignty and worried that the *Swift* Doctrine "permitted the federal courts to declare rules of law in areas beyond the powers delegated to the federal government by the Constitution."[45]

Ten years, virtually to the day, after Justice Holmes issued his challenge in *Black & White*, the Court laid to rest the specter of *Swift* in *Erie v. Tompkins*.[46] The facts are familiar. Mr. Tompkins was walking along a pathway adjacent to the railroad tracks when he was struck and injured by an open freight door protruding from a passing train.[47] The injury occurred in Pennsylvania, where Mr. Tompkins was domiciled. He brought his action in federal district court for the Southern District of New York. Venue was proper because the Erie Railroad Company was a citizen of New York, and subject matter jurisdiction was based upon diversity.[48]

At issue was whether Pennsylvania decisional law or federal common law applied. Under Pennsylvania law, as announced by its highest court, Mr. Tompkins was a mere trespasser, and Erie would be liable only if its actions constituted "wanton or willful" negligence.[49] On the other hand, Mr. Tompkins contended that no such law had been established by the Pennsylvania courts, and, relying on *Swift*, argued that even if it had, because there was no statute in place, federal common law applied. Under federal common law, the railroad was lia-

44. *Id.* at 533.
45. 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4502 n.25 (2d ed. 1987).
46. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
47. *Id.* at 69.
48. *Id.*
49. *Id.* at 70.

ble if it were guilty of simple negligence.[50] The trial judge refused to apply the Pennsylvania decisional law, and the jury awarded $30,000 in damages, which award was affirmed by the Second Circuit Court of Appeal.[51]

The Court framed the issue as "whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."[52] Justice Brandeis, who joined the dissent in *Black & White*, began his analysis by quoting extensively from Justice Story's opinion in *Swift*, in which the Court concluded that the RDA was never intended by the framers to apply to anything other than positively stated statutory law.[53] Justice Brandeis then noted that "[d]oubt" had been "repeatedly expressed" regarding the correctness of the *Swift* Court's interpretation, and cited to an article by Professor Warren which, according to the Court, "established that the construction given to [the RDA] was erroneous. . . ."[54] The better construction of the Act, according to Professor Warren, and adopted by the Court, was that "in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written."[55]

Apart from its historical analysis, the Court cited several reasons for overruling *Swift*. The Court did refer to the difficulty in distinguishing between "local" matters governed by state law, and "questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation,"[56] but the primary bases for reversing *Swift* were twofold. First, the application of federal common law in diversity cases resulted in "grave discrimination by noncitizens against citizens" and thereby "rendered impossible equal protection of the law."[57] This unequal application of law, in the Court's view, improperly incentivized forum shopping.[58]

50. *Id.*
51. *Id.*
52. *Id.* at 69.
53. *Id.* at 71-72.
54. *Id.* at 72-73, *citing* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923).
55. *Id.* at 72-73.
56. *Id.* at 71.
57. *Id.* at 74-75.
58. *Id.*

This rationale gave rise to the oft-cited "twin aims" of *Erie*: to discourage forum-shopping and to avoid the inequitable administration of the laws as between state and federal courts.[59]

The second constitutionally based rationale was grounded in principles of federalism. The Court asserted that conferring upon the federal courts the ability to make law in abrogation of state law unconstitutionally exceeded the powers granted to the federal government and encroached upon authority reserved to the states.[60] In this regard, the Court declared that

> whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power on the federal courts.[61]

Although a number of other cases were decided in the intervening period, the next significant case in the line is *Guaranty Trust Co. v. York*.[62] The *York* plaintiffs brought a class action against a bond trustee alleging misrepresentation and breach of trust. In response, the defendant alleged that the suit was barred by New York's statute of limitations. The plaintiffs argued that the federal standard of laches should apply because the suit sounded in equity rather than in law, and, therefore, the suit was not barred. The trial court granted summary judgment in favor of Guaranty Trust on the theory that the suit was precluded by previous litigation. The Second Circuit found the suit was not precluded and further held that the suit was not time-barred because the equitable doctrine of laches applied.[63]

The Supreme Court disagreed. After discussing the traditional distinction between law and equity, the Court characterized the issue as having

> reduce[d] itself to the narrow question whether, when no recovery could be had in a State court because the action is barred by the statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship between the parties. Is the outlawry, according to State law, of a claim cre-

59. *Id.* Erie, 304 U.S. at 74-75.
60. *Id.* at 77-78.
61. *Id.*
62. Guar. Trust Co. v. York, 326 U.S. 99 (1945).
63. *Id.* at 100-01.

> ated by the States a matter of 'substantive rights' to be respected by a federal court of equity when that court's jurisdiction is dependent on the fact there is a State-created right, or is such statute of 'a merely remedial character,' which a federal court may disregard?[64]

In answer to that question, the Court created the now lamented "outcome determinative" test, and moved away from trying to make a principled distinction between "substance" and "procedure." In particular, the Court stated,

> [t]he question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard the law of a State that would be controlling in an action upon the same claim by the same parties in a State court?[65]

Further refining its outcome determinative litmus test, the Court continued,

> [i]t is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us. [*Erie*] was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies [*Erie*] is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.[66]

Justice Frankfurter, writing for the Court, asserted that the purpose of *Erie* was to ensure that the happenstance of the forum should be irrelevant to the substantive rights of the parties. Therefore, the result of the litigation should be substantially the same in federal court as in state court, while allowing for differing methodologies by which that substantially similar outcome was achieved. It does not require an intuitive quantum leap to recognize that a statute of limitations, which is by definition,

64. *Id.* at 107-08.
65. *Id.* at 109.
66. *Id.* at 109.

outcome determinative to the extent that the case is barred, is "substantive" for purposes of the outcome determinative test.

The case is unfortunate not only because it ignores the federalism concerns expressed in *Erie* as further support for the result, but also because if the "outcome determinative" test is applied consistently, virtually every procedural rule will be outcome determinative. Suppose, for example, that a "local rule" requires pleadings to be three-hole punched. If a litigant failed to comply with the rule, the court clerk would refuse the filing, and the dispute would never be heard. The example is, perhaps, a trifle disingenuous, practically speaking (one assumes the litigant would simply three hole-punch the pleading and refile), but it does highlight the theoretical absurdity of the strictly outcome determinative test expressed in *York*.

Professor Floyd, expressing similar concerns, stated the problem as follows:

> *York* thus carried *Erie* well beyond rules of 'substance' as understood to encompass the prescription of rights and duties governing the primary conduct and relations of the parties and even beyond the realm of 'substance' as understood to refer to legal rules having objectives external to the fair and efficient conduct of the litigation process itself.[67]

The Court in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc*.[68] attempted to refine the outcome determinative test, but may have succeeded only in adding to the confusion.[69] At issue in *Byrd* was the statutory scheme adopted by the South Carolina legislature regarding workers' compensation for injured employees. The statute contemplated that the judge, rather than the jury, would decide the putative employee's status, which, in turn, would determine whether the plaintiff could seek compensation apart from that which he or she is statutorily entitled to receive, whereas in the federal scheme that was a factual matter for the jury.[70] The Court split five to four on this issue, but ultimately resolved it in favor of adopting federal

67. C. Douglas Floyd, *Erie Awry: A Comment on Gasperini v. Center for Humanities, Inc.*, 1997 B.Y.U. L. REV. 267, 274 (1997).

68. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

69. Indeed, until the Court issued its opinion in *Gasperini*, the only reference to *Byrd* was in *Hanna*, and then only for the proposition that "'[o]utcome-determination' analysis was never intended to serve as a talisman." Hanna v. Plumer, 380 U.S. 460, 466-7 (1965).

70. *Byrd*, 356 U.S. at 533.

practice, thus signaling a retreat from the rigid outcome determinative test.

The Court began its analysis by asserting that *Erie* requires a federal district court to "respect the definition of state created rights and obligations by the state courts,"[71] and then modified the statement, saying that a state rule need only be applied where it is "bound up" with rights and obligations as defined by the state substantive law.[72] The Court concluded that there was no evidence that the allocation of decision making authority contemplated by the state statutory scheme was "an integral part" of the statute, but rather "merely a form and mode of enforcing the immunity," rather than "a rule intended to be bound up with the definition of the rights and obligations of the parties."[73]

The Court then proceeded to apply the outcome determinative test, and conceded that "[i]t may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury."[74] However, the Court said, "outcome" was not the sole arbiter of the issue.[75] Rather, there were "countervailing considerations" in an independent federal system that "distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."[76]

Having thus backed away from the pure outcome determinative test articulated in *York*, the Court reframed the test as follows: "the inquiry here is whether the federal policy . . . should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court."[77] *Byrd* is generally read as establishing a "balancing test" which requires a federal court to balance the federal interest in applying a federal rule of procedure against the state's interest.[78] It should not,

71. *Id.* at 535.
72. *Id.*
73. *Id.* at 536.
74. *Id.* at 537.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

however, be assumed that the pendulum has swung all the way back to the point where any federal interest trumps the state interest. As the *Byrd* Court made clear, the key to the analysis is whether the state rule is concerned only with the "form and mode" of the litigation and not some other state interest unconnected with the manner in which a substantive right is vindicated. Any other interpretation would violate the core of *Erie* by unconstitutionally permitting federal intervention into legislative authority reserved to the states by the Tenth Amendment and the Constitution's overall scheme of reserved powers.

The next significant development occurred in the landmark case of *Hanna v. Plumer*.[79] At issue in *Hanna* was whether the federal court should apply the state's requirement that an executor be served "in hand" or the standard adopted in Rule 4, which permits service by leaving copies of the summons and complaint at the defendant's residence.[80] The plaintiff had served the defendant by leaving copies of the summons and complaint at his residence with his spouse, but did not personally serve him within the statutory limitations period.[81]

Relying on *York*, the defendant argued that because service was inconsistent with the state standard, and that the plaintiff's case would be barred in state court for that reason, it should likewise be barred in federal court.[82] It is a reasonable argument, based upon the Court's prior precedent. Realizing, however, that the outcome determinative test includes too much in the sense that virtually every procedural rule could be outcome determinative in some sense,[83] the Court took yet another step away from *York*.

The Court began this distancing process by citing *Byrd* for the proposition that "'[o]utcome-determination' analysis was never intended to serve as a talisman."[84] Rather, the outcome determination test must be read with "reference to the twin aims of the Erie rule: discouragement of forum-shopping and

79. *Hanna*, 380 U.S. 460.
80. FED. R. CIV. P. 4(e)(2).
81. *Hanna*, 380 U.S. at 461.
82. *Id.* at 461-62.
83. *Id.* at 468 ("[I]n this sense every procedural variation is 'outcome-determinative.'").
84. *Id.* at 466-67.

avoidance of inequitable administration of the laws."[85] Moreover, the Court asserted, when there is a Federal Rule of Procedure on point, the correct analytic structure is that undertaken in *Sibbach v. Wilson & Co.*[86]

That is, the function of a district court in determining which rule to apply is to ascertain whether the Federal Rule in question is truly procedural in that it falls within the boundaries of the authority delegated by the Rules Enabling Act ("REA"). If it is, it controls, even where application of the Federal Rule will yield an outcome different from that which would be obtained in state court.[87]

The effect of *Hanna*, then, is to bifurcate *Erie* analysis even beyond the procedure/substance dichotomy.[88] First, if there is a federal procedural rule on point, it governs provided it is within the scope of the REA. This result is necessitated because Congress and the Supreme Court, pursuant to Articles I and III respectively, have the authority to promulgate rules of procedure to be applied in federal courts,[89] and the Supremacy Clause mandates that such rules take precedence over state created rules.[90] In short, so long as the Rule can be "rationally capable of classification"[91] as relating to the "practice and procedure . . . in the United States district courts,"[92] the Federal Rule applies, even where application of the Federal Rule would be outcome determinative. And therein lies the rub. It is the *Hanna* line of cases that causes the most trouble for anti-SLAPP early motions to dismiss filed in federal district court.

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85. *Id.* at 468.

86. *Id.* at 470-71 (citing Sibbach v. Wilson & Co., 312 U.S. 1 (1941)).

87. *Id.* at 470. As the Court put it, "[w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie Choice: the court has been instructed to apply the Federal Rule and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Id.*

88. *See, e.g.,* Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637 (1998).

89. *See* U.S. CONST. art. I.

90. U.S. CONST. art. III.

91. *Hanna*, 380 U.S. at 472.

92. 28 U.S.C. § 2072 (1988).

IV. The Intersection Between *Erie* and Anti-SLAPP

Among the first federal courts to consider an early motion to dismiss under an anti-SLAPP regime was the District Court in Massachusetts.[93] That court heard two cases, both of which were decided in 1996, and in both instances the court chose not to apply the state's Anti-SLAPP law. In the first case, *Milford Power Limited Partnership v. New England Power Co. et al.*,[94]

93. The court was construing the Massachusetts statute MASS. GEN. LAWS ANN. ch. 231, § 59H (1994), providing:

> In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
>
> The attorney general, on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party on such special motion.
>
> All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion. Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.
>
> If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.
>
> As used in this section, the words "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

94. Milford Power Ltd. P'ship v. New England Power Co., 918 F. Supp. 471 (D. Mass. 1996).

Milford had argued that the anti-SLAPP legislation entitled it to an early motion to dismiss for a number of reasons. First, argued Milford, the statute broadened the right to petition by including a provision for a stay of discovery and attorneys fees. Milford also argued that the statute was "outcome determinative" for purposes of an *Erie* analysis. Lastly, Milford asserted that application of the statute would "discourage forum shopping, avoid the inequitable administration of laws, and effect Massachusetts public policy of encouraging public participation in all public fora."[95] The court disagreed and declined the invitation to engage in an *Erie* analysis, simply finding that the challenged counterclaims did not constitute a SLAPP suit.

In the next case that the Massachusetts court considered, the court did engage in an *Erie* analysis, at least to the extent that it found that the Federal Rules of Civil Procedure occupied the field under *Hanna*. In *Baker v. Coxe*, the court denied the special motion to dismiss stating that:

> [t]o the extent that the anti-SLAPP statute imposes additional procedures in certain kinds of litigation . . . it does not trump [Rule] 12(b)(6) . . . Accordingly, this [c]ourt will examine the allegations of the complaint under the well-worn standards governing [Rule] 12(b)(6) motions, not the hybrid statutory procedure in section 59H which is more akin to a summary judgment motion.[96]

The district court in Massachusetts remained hostile to anti-SLAPP legislation, and in *Stuborn Ltd. Partnership v. Bernstein* once again denied an early motion to strike. Relying on *Baker*, the court concluded that it was:

> persuaded that the Anti-SLAPP statute's special motion provision is predominantly procedural in nature and that it directly conflicts with the Federal Rules of Procedure. Because of the collision between the federal and state procedure noted above, in a diversity action the Federal Rules of Civil Procedure supplant the state Anti-SLAPP procedures as the Supreme Court instructed in *Hanna v. Plumer*.[97]

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95. *Id.* at 488.

96. Baker v. Coxe, 940 F. Supp. 409, 417 (D. Mass. 1996). Although not a federal case, and therefore only tangentially related to the present discussion, two years after *Milford* and *Baker*, the Supreme Judicial Court of Massachusetts demonstrated a similar hostility towards anti-SLAPP legislation. In denying the special motion, the court observed that the anti-SLAPP statutory scheme "alters procedural and substantive law in a sweeping way. . . ." Duracraft Corp. v. Holmes Products Corp., 691 N.E.2d 935, 943 (1998).

97. Stuborn Ltd. P'ship v. Bernstein, 245 F. Supp. 2d 312, 316 (D. Mass. 2003).

The court went on to lament that it would be ill-advised to decide the issue on the "scant evidence of record" thereby totally ignoring the immunity aspect of anti-SLAPP legislation, which is designed to free the SLAPP defendant/target from onerous discovery requirements.[98]

In *Card v. Pipes*,[99] the federal district court in Oregon was more receptive to that state's Anti-SLAPP statute.[100] In *Card*,

98. *Id.*

99. Card v. Pipes, 398 F. Supp. 2d 1126 (Or. 2004).

100. Although the *Card* court was construing OR. REV. STAT. § 30.142 (2001), the statue has been renumbered to OR. REV. STAT. § 31.150 (2003), and provides:

> (1) A defendant may make a special motion to strike against a claim in a civil action described in subsection (2) of this section. The court shall grant the motion unless the plaintiff establishes in the manner provided by subsection (3) of this section that there is a probability that the plaintiff will prevail on the claim. The special motion to strike shall be treated as a motion to dismiss under ORCP 21 A but shall not be subject to ORCP 21 F. Upon granting the special motion to strike, the court shall enter a judgment of dismissal without prejudice.
> (2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:
> (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;
> (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;
> (c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or
> (d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.
> (3) A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section. If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.
> (4) In making a determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
> (5) If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim:
> (a) The fact that the determination has been made and the substance of the determination may not be admitted in evidence at any later stage of the case; and
> (b) The determination does not affect the burden of proof or standard of proof that is applied in the proceeding.

the primary issue before the court was whether Oregon's Anti-SLAPP early motion to strike was available in federal district court.[101] Relying on Ninth Circuit precedent,[102] the court held that, as a general matter, anti-SLAPP legislation applies in federal district court, but nonetheless denied the early motion to strike because the court had decided to dismiss the action for either insufficiency of process or failure to state a claim, thereby mooting the anti-SLAPP motion.

The district court in Georgia was likewise persuaded by the Ninth Circuit's precedent. In *Buckley v. DirectTV, Inc.*,[103] the court found, as a threshold matter, that the applicable Georgia statute could be used by defendant/targets in federal district court.[104] In this case, the issue turned on whether letters threat-

101. *Card*, 398 F. Supp. 2d 1126.
102. *See infra* pp. 17-22.
103. Buckley v. DirectTV, Inc., 276 F. Supp. 2d 1271 (N.D. Ga. 2003).
104. The Georgia statute, GA. CODE ANN. § 9-11-11.1 (1996) provides:

> (a) The General Assembly of Georgia finds and declares that it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances. The General Assembly of Georgia further finds and declares that the valid exercise of the constitutional rights of freedom of speech and the right to petition government for a redress of grievances should not be chilled through abuse of the judicial process.
>
> (b) For any claim asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern, both the party asserting the claim and the party's attorney of record, if any, shall be required to file, contemporaneously with the pleading containing the claim, a written verification under oath as set forth in Code Section 9-10-113. Such written verification shall certify that the party and his or her attorney of record, if any, have read the claim; that to the best of their knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; that the act forming the basis for the claim is not a privileged communication under paragraph (4) of Code Section 51-5-7; and that the claim is not interposed for any improper purpose such as to suppress a person's or entity's right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation. If the claim is not verified as required by this subsection, it shall be stricken unless it is verified within ten days after the omission is called to the attention of the party asserting the claim. If a claim is verified in violation of this Code section, the court, upon motion or upon its own initiative, shall impose upon the

ening legal action against certain recipients of allegedly pirated satellite television constituted an act of public concern that could give rise to a SLAPP suit. The court held it could and further held that the plaintiff's complaint against DirectTV should be dismissed as a SLAPP.[105]

The remainder of the federal jurisprudence involves the construction of California's Anti-SLAPP statutory scheme.[106] The two leading cases are both Ninth Circuit opinions. Although they can be reconciled, it is difficult.[107] The first is *United States ex rel. v. Lockheed Missiles & Space Company*.[108] *Lock-*

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persons who signed the verification, a represented party, or both an appropriate sanction which may include dismissal of the claim and an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

(c) As used in this Code section, "act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern" includes any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.

(d) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a motion to dismiss or a motion to strike made pursuant to subsection (b) of this Code section. The motion shall be heard not more than 30 days after service unless the emergency matters before the court require a later hearing. The court, on noticed motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted notwithstanding this subsection.

(e) Nothing in this Code section shall affect or preclude the right of any party to any recovery otherwise authorized by common law, statute, law, or rule.

(f) Attorney's fees and expenses under this Code section may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition, including but not limited to dismissal by the plaintiff, of the action.

105. *Buckley*, 276 F. Supp. 2d 1271.

106. As of this writing, the author remains unaware of any other federal opinions construing other states' anti-SLAPP regimes. Any omission is entirely the fault of the author.

107. *See, e.g.*, Vess v. Ciba Geigy Corp., 317 F.3d 1097, 1109 (9th Cir. 2003) (*citing* U.S. *ex rel.* v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999) for the proposition that motions to strike under the California statute are permissible in federal court, but referencing Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832 (9th Cir. 2001) as being in disagreement.).

108. *Lockheed*, 190 F.3d 963; *accord* Nicosia v. De Rooy, 72 F. Supp. 2d 1093 (N.D. Cal. 1999).

heed involved a *qui tam* action by a pair of realtors against Lockheed alleging that Lockheed had submitted millions of dollars of false claims associated with excessive unproductive labor costs. Lockheed then counterclaimed against the *qui tam* plaintiffs alleging that the whistleblowers had violated various fiduciary and contractual obligations. The district court initially followed the reasoning of the Massachusetts courts and found that the Federal Rules superceded the state legislation,[109] but the Ninth Circuit reversed.

The court began its analysis by determining whether there was a "direct collision" between the federal rules and the Anti-SLAPP legislation. It noted that the only two provisions of the legislation at issue were the motion to strike and the attorneys' fees sections—details that became important in the other Ninth Circuit case, discussed *infra*. The court concluded that the anti-SLAPP scheme did not conflict with Federal Rules 8, 15 and 56 and that they "can exist side by side . . . each controlling its own intended sphere of coverage without conflict. . . . We fail to see how the prior application of the anti-SLAPP provisions will directly interfere with the operation of Rule 8, 12, or 56. In summary, there is no 'direct collision' here."[110] The court went on to observe that although there was some overlap between the federal mechanisms for "weeding out meritless claims," the Anti-SLAPP legislation served another, more important, function which is the protection of "'the constitutional rights of freedom of speech and petition for redress of grievances.'"[111]

Having concluded that there was no "'direct collision'" and the two sets of rules could coexist, the court explained that it must then "make the 'typical, relatively unguided *Erie* choice.'"[112] Citing *Byrd*, the court attempted to balance the federal interests that would be undermined by applying the California statute and was unable to identify any. On the other hand, the court recognized that "California has articulated the important, substantive state interests furthered by the Anti-

109. U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., Inc., No. C 88-20009 JW, 1995 WL 470218 (N.D. Cal. Aug. 2, 1995).

110. *Lockheed*, 190 F.3d at 972.

111. *Id.* at 973.

112. *Id.*

SLAPP statute."[113] The court concluded the opinion with language that is important for purposes of the instant discussion:

> We also conclude that the twin purposes of the *Erie* rule—'discouragement of forum shopping and avoidance of inequitable administration of the law'—favor application of California's Anti-SLAPP statute in federal cases. Although Rules 12 and 56 allow a litigant to test the opponent's claims before trial, California's 'special motion to strike' adds an additional, unique weapon to the pretrial arsenal, a weapon whose sting is enhanced by a[n] entitlement to fees and costs. Plainly, if the Anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable disadvantage in a federal proceeding. This outcome appears to run squarely against the 'twin aims' of the *Erie* doctrine.[114]

This seems patently obvious, and further seems to be the right result.

But the Ninth Circuit departed from its prior precedent in its next decision. *Metabolife Int'l, Inc. v. Wornick, et al.* was a lawsuit filed by Metablolife against various defendants for defamation arising out of a television broadcast in which the defendant/targets alleged, among other things, that the product Metabolife was selling "can kill you."[115] The defendant/targets filed an early motion to strike pursuant to California's Anti-SLAPP statute. The district court initially granted the motion, but the Ninth Circuit reversed, holding that Metabolife was entitled to discovery.[116] The court did say that "[t]he anti-SLAPP statute was enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation,"[117] but then proceeded to allow the "costly, time consuming litigation" to continue.[118]

The court's reasoning displayed an almost arrogant disregard of state law. It is not exactly the *Taxicab* case, but it appears dangerously *Swift*-esque. Judge Hawkins began the court's opinion by identifying a "direct collision" between the anti-SLAPP statute and federal law, stating that "the district

113. *Id.*
114. *Id.*
115. Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 854 (9th Cir. 2001).
116. *Metabolife*, 264 F.3d 832.
117. *Id.* at 839.
118. *Id.*

court erred in not allowing [Metabolife] discovery because the discovery-limiting aspects of the anti-SLAPP statute conflict with Federal Rule of Civil Procedure 56."[119] Having found a "direct collision," the court distinguished itself from its prior precedent in *Lockheed* by noting that discovery was not in issue in *Lockheed.* With this distinction in place, the court decided that it need not engage in the "typical, relatively unguided *Erie* Choice."[120] The unguided *Erie* analysis would have required the court to balance the state's interest in providing SLAPP defendant/targets an extra weapon against meritless suits designed to chill constitutionally protected speech against the federal interest in the federal rules.[121] The court declined to do this, relying on a prior district court opinion in *Rogers v. Home Shopping Network*.[122] The court concluded that "the discovery-limiting aspects of [the Anti-SLAPP statute] collide with the discovery-allowing aspects of Rule 56. . .[and] cannot apply in federal court."[123]

This conclusion seems short-sighted. One of the primary aims of the anti-SLAPP statutory schemes is to protect defendant/targets from what is arguably the most expensive and bothersome part of litigation: discovery. Indeed, in the federal system, a motion for summary judgment pursuant to Rule 56 is generally improper until discovery has closed.[124] Thus, with one swipe of the pen, the Ninth Circuit essentially neutered the anti-SLAPP statutory scheme. The court blatantly disregarded the states' legitimate interest in curtailing lawsuits filed not in furtherance of redressing legitimate grievances, but rather soley to harass the defendant/targets and chill constitutionally pro-

119. *Id.* at 845.

120. *Id.*

121. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

122. Rogers v. Home Shopping Network, 57 F. Supp. 2d 973 (C.D. Cal. 1999). District Judge Pregerson was especially caustic. Characterizing the California Anti-SLAPP early motion to strike as a "rule of procedure", the court held: "If a defendant makes a special motion to strike based on alleged deficiencies in the plaintiff's complaint, the motion must be treated in the same manner as a motion under Rule 12(b)(6) except that the attorney's fee provision of § 425.16 applies. If a defendant makes a special motion to strike based on the plaintiff's alleged failure of proof, the motion must be treated in the same manner as a motion under Rule 56 except that again the attorney's fees provision of §425.16(c) applies." *Id.* at 977, 983.

123. *Metabolife*, 264 F.3d at 846.

124. FED. R. CIV. P. 56(f).

tected rights. What better way to harass than to deluge a defendant/target with a barrage of discovery? Plaintiffs contemplating filing a SLAPP suit would be wise to shop for a federal forum.

Judge Rymer, concurring in part and dissenting in part in *Metabolife*, got it right: "we have no call to decide, let alone conclude (as the majority does) that the anti-SLAPP statute and the Federal Rules of Civil Procedure conflict because discovery can be . . . tailored by the district court to match the issues necessary to make an [anti-SLAPP] determination. . . ."[125] If discovery is necessary for the SLAPP plaintiff to prove a "reasonable probability of success," the statutes themselves provide for this limited discovery, and the Federal Rules can therefore peaceably "co-exist" with the various statutory schemes.

At least two district courts have agreed with Judge Rymer, and declined to follow *Metabolife*. In *New.Net, Inc. v. Lavasoft*,[126] Judge Feess distinguished *Metabolife* by citing to *Batzel v. Smith*[127] for the proposition that the anti-SLAPP legislation at issue authorizes limited discovery for "good cause shown." That being the case, the *New.Net* court saw "no inherent 'direct collision' between the expedited procedure contemplated in the anti-SLAPP statute and the provisions of Rule 56. Indeed, to find such a collision would undermine the holding in *Lockheed* permitting the use of the anti-SLAPP procedure in federal court."[128] Judge Feess is almost certainly right. If district courts elect to follow *Metabolife*, then *Lockheed* and *Batzel* must be ignored with the result being that anti-SLAPP protections are not available in federal courts.

The court in *Flores v. Emerich & Fike*[129] recognized that this was the case. There, the court recognized that:

> *Metabolife*, in contrast to *Lockheed*, draws almost no distinction between an anti-SLAPP motion and a motion for summary judgment. In so holding, *Metabolife* arguably conflicts with *Lockheed*'s holding that an anti SLAPP motion is a procedural tool that can be distinguished from a motion for summary judgment. Yet, *Metabolife* cited with approval to and did not overrule *Lockheed*'s

125. *Metabolife*, 264 F.3d at 852.
126. New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090 (C.D. Cal. 2004).
127. Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003).
128. *New.Net, Inc.*, 356 F. Supp. 2d 1102.
129. Flores v. Emerich & Fike, No. 1:05-CV-0291 OWW DLB, 2006 WL 2536615 (E.D. Cal. Aug. 31, 2006).

> holding as to [the Anti-SLAPP provisions]. The only way to interpret *Metabolife* without eviscerating *Lockheed* is to apply it narrowly only to situations where a plaintiff asserts **prior to decision on an anti-SLAPP motion** that discovery might influence the outcome of the motion to strike.[130]

A third Ninth Circuit case raised the issue of whether the denial of a motion to strike pursuant to the anti-SLAPP regime was subject to interlocutory appeal.[131] In *Batzel*, the district court denied anti-SLAPP defendants' motions to strike and the defendants sought appellate review.[132] The court noted that if the case were being litigated in a California state court, an anti-SLAPP motion would be immediately appealable.[133] In finding that the denial of a motion to strike is immediately appealable under the collateral order doctrine, the court sensibly observed that, "[b]ecause the anti-SLAPP motion is designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression, the district court's denial of an anti-SLAPP motion would effectively be unreviewable from a final judgment."[134] In support of its position, the court looked to the legislative history of California's Anti-SLAPP law, and quoted from the Senate Judiciary Committee Report associated with the legislation as follows: "When a meritorious anti-SLAPP motion is denied, the defendant, under current law, has only two options. The first is to file a writ of appeal, which is discretionary and rarely granted. The second is to defend the lawsuit. If the defendant wins, the anti-SLAPP lawsuit is useless and has failed to protect the defendant's constitutional rights."[135] Citing to *Erie*, the *Batzel* court concluded that "[b]ecause California law recognizes the protection of the anti-SLAPP statute as a substantive immunity from suit, this Court, sitting in diversity, will do so as well."[136]

Although the courts in *Batzel*, *Ciba-Geigy Corp. USA*, *New.Net* and *Emerich & Fike* showed appropriate deference to the substantive anti-SLAPP legislation, some federal courts con-

130. *Id.* at 9.
131. *Batzel*, 333 F.3d 1018.
132. *Id.*
133. CAL. CIV. PROC. CODE § 425.16(i) (2005).
134. *Batzel*, 333 F.3d at 1025.
135. *Id.*
136. *Id.* at 1025-26.

tinue to be hostile. In *Bulletin Displays, LLC v. Regency Outdoor Advertising, Inc. et al.*,[137] the court asserted that

> [s]pecial procedural rules apply where an anti-SLAPP motion is brought in federal court. If a defendant makes an anti-SLAPP motion based on the plaintiff's failure to submit evidence to substantiate its claims, the motion is treated as a motion for summary judgment, and discovery 'must be developed sufficiently to permit summary judgment under Rule 56.'[138]

The court went on to hold that if the motion to strike is challenging the pleading itself, the court must review it in light of Federal Rules 8 and 12.[139] In other words, in this court's view, Federal Rules 8, 12 and 56 occupy the field and the anti-SLAPP statutory scheme may be effectively ignored.

Federal courts have limited the application of anti-SLAPP regimes in other ways as well. For example, in *Globetrotter Software, Inc. v. Elan Computer Group, Inc. et al.*, the court held that the Anti-SLAPP statute is not applicable to federal claims in federal court, but rather only to state claims asserted in diversity cases or pendant to a federal claim.[140] Anti-SLAPP motions are not available in bankruptcy court.[141] The Ninth Circuit has also held that plaintiffs may file an amended complaint in the face of an anti-SLAPP motion to strike because not allowing a plaintiff to file an amended complaint "would directly collide with [Rule] 15(a)'s policy favoring liberal amendment."[142] Thus, a duplicitous SLAPP plaintiff can amend until finding a theory that can avoid the federal standard either for failure to state a claim or for summary judgment.

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137. Bulleting Displays, LLC v. Regency Outdoor Adver., Inc. 448 F. Supp. 2d 1172 (C.D. Cal. 2006).

138. *Id.* at 1180.

139. *Id.*

140. Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999); *accord* American Dental Ass'n v. Khorrami, No. CV 02-3853 DT(RZX), 2002 WL 32875154 (C.D. Cal. Nov. 18, 2002); Condit v. Nat'l Enquirer, 248 F. Supp. 2d 945 (E.D. Cal. 2002) (Court held that the anti-SLAPP suit statute did not apply and denied defendant's request for summary judgment and attorney's fees.); Optinrealbig.Com, LLC v. Ironport Systems, Inc., No. C 04-1687 SBA, 2004 WL 1737275 (N.D. Cal. July 28, 2004); IDEC Corp. v. Am. Motorists Ins. Co., Inc., No. C 02-1723 JF (RS), 2006 WL 2255235 (N.D. Cal. Aug. 7, 2006); Best v. Hendrickson Appraisal Co., Inc., No. 06-CV-1358 W(JMA), 2007 WL 1110632 (S.D. Cal. Mar. 28, 2007) ("Because federal law does not incorporate the California anti-SLAPP statute, the court will deny the special motion to strike").

141. *In re Bah*, 321 B.R. 41 (9th Cir. 2005).

142. Verizon Delaware, Inc. v. Covad Communications Co., 377 F.3d 1081, 1091 (9th Cir. 2004).

V. Conclusion

Federal district courts sitting in diversity should view anti-SLAPP regimes as the substantive law in which the district court sits. These legislative schemes should be viewed as providing the SLAPP defendant with qualified, substantive immunity to be free from having to litigate in the first instance. Those federal courts that reduce an anti-SLAPP motion to strike to a Rule 56 summary judgment do violence to the state legislatures' principal aim of rendering SLAPP defendant/targets immune from SLAPP suits. This is so because Rule 56 requires that substantial discovery must be done before the court will entertain such a motion. Therefore, the SLAPP defendant/target is required to incur exactly what legislatures sought to avoid. The federal scheme forces the defendant/target to litigate a meritless suit brought not for purposes of winning the lawsuit, but rather to harass the defendant/target and drain economic resources in the attempt to chill Constitutionally protected activity or speech.

Moreover, ignoring anti-SLAPP legislation in favor of the Federal Rules of Civil Procedure also requires that the district court ignore *Erie* and its progeny. The federal policy adopted by the courts following *Metabolife* greatly increases the chances that a SLAPP plaintiff will choose a federal forum because the federal forum likely will not provide the SLAPP defendant/target with the protections the various state legislatures intended.

Likewise, principles of federalism strongly suggest that federal district courts sitting in diversity should apply anti-SLAPP laws as substantive laws. To do otherwise would be to thwart the state legislatures in the twenty-three jurisdictions in which Anti-SLAPP schemes exist.

Perhaps of even greater concern is that the *Metabolife* line of cases not only greatly undermine *Erie* and its progeny, but the emerging federal doctrine encroaches dangerously on state sovereignty. States have a strong interest in protecting their citizens from meritless, harassing litigation which chills activity that is otherwise protected. Federal courts should not ignore the legislation that provides that protection.